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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 124

EDWARD LEON WILLIAMS,

Petitioner,

vs.

THE STATE OF OKLAHOMA.

ON WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

BRIEF OF PETITIONER

EDWARD LEON WILLIAMS,
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INDEX

SUBJECT INDEX

BRIEF OF PETITIONER

CITATIONS:

Cases:

IN THE SUPREME COURT OF THE UNITED STATES

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Citation of State Reports

Edward Leon Williams vs. State of Oklahoma, No. A-12467, Criminal Court of Appeals of Oklahoma, December 4, 1957; rehearing denied, February 5, 1958; second petition for rehearing denied, February 26, 1958. Okla. Cr., 321 P. 2d 990-1008.

(All italics are by counsel for petitioner.)

Grounds of Jurisdiction

The basis for jurisdiction in this Court is Title 28 U.S.C. sec. 1257(3); petition for certiorari filed May 22, 1958; certiorari granted June 23, 1958, —— U.S. ——, 2 L.ed. 2d 1369. Petition for writ of certiorari filed with the Clerk of this Court within ninety days after entry of final judgment in the Criminal Court of Appeals of Oklahoma.

Constitutional Provision and Statutes

Amendment Fourteen to the Constitution of the United States,

> Section 1: " * * * nor shall any state deprive any person of life, liberty, or property, without due process of law; * * * "

Oklahoma Statutes, 1951:

> Title 21, sec. 745 (Vol. 1, page 1169): "Kidnapping for purpose of extortion—Assisting in disposing, receiving, possessing or exchanging money or property received.—A. Every person who, without lawful authority, forcibly seizes and confines another or inveigles or kidnaps another, for the purpose of extorting any money, property or thing of value or advantage from the person so seized, confined, inveigled or kidnaped, or from any other person, or in any manner threatens either by written instrument, word of mouth, message, telegraph, telephone, by placing an ad in a newspaper, or by messenger, demands money or other thing of value, shall be guilty of a felony, and upon conviction shall suffer death or imprisonment in the penitentiary, not less than ten years."
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> Title 21, sec. 701 (Vol. 1, page 1165): "Murder defined.—Homicide is murder in the following cases.

"1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being.

"2. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

"3. When perpetrated without any design to effect death by a person engaged in the commission of any felony. R.L. 1910, sec. 2313."

Title 22, sec. 973 (Vol. 1, page 1307): "Court may hear further evidence, when.—After a plea or verdict of guilty in a case where the extent of the punishment is left with the court, the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may in its discretion hear the same summarily at a specified time and upon such notice to the adverse party as it may direct. R.L. 1910, sec. 5954."

Title 22, sec. 974 (Vol. 1, page 1307): "Testimony.—How presented—Deposition of sick or infirm witness.—The circumstances *must be presented by the testimony of witnesses* examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county out of court, at a specified time and place, upon such notice to the adverse party as the court may direct. R.L. 1910, sec. 5955."

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received by the court or member thereof in aggravation or mitigation of the punishment, *except as provided in the last two sections.* R.L. 1910, sec. 5956."

Question for Review

Petitioner pled guilty to the charge of murder in Muskogee County, Oklahoma, and was *sentenced to life* in the penitentiary for that crime; at a subsequent date, in Tulsa County, Oklahoma, petitioner pled guilty to the charge of kidnapping the same victim whom he had murdered as a result of the kidnapping and was sentenced to *death* for the kidnapping. Under the facts and circumstances of this case, was the petitioner denied fundamental fairness and justice under Due Process of Law in the following respects:

(1) Petitioner has been twice placed in jeopardy of his life and twice punished for the same offense in that:

(a) Conviction of murder is a complete bar to prosecution for the kidnapping, or

(b) To the extent that the sentence in the kidnapping prosecution is based upon the murder, it is a double punishment for the murder.

(2) The doctrine of *res judicata* precludes a reconsideration of the murder in the punishment for kidnapping.

(3) The trial court considered highly prejudicial, unsworn, hearsay statements to inflict the death penalty.

(4) The death penalty is disproportionate, unreasonable, and fundamentally unfair as the punishment for kidnapping in this case.

Statement of Case

On June 17, 1956, petitioner was charged in the District Court of Oklahoma within and for Muskogee County, Case No. 9658, with the murder of one Tommy Robert Cooke, on June 17, 1956, in Muskogee County, Oklahoma. On November 19, 1956, petitioner pled guilty in said case to the murder of Tommy Cooke (R. 22) and the Trial Court, after reviewing the case, there sentenced petitioner to life imprisonment in the State penitentiary for said murder (R. 22). The Court in Muskogee County had appointed Mr. Paul Gotcher to represent petitioner as a pauper.

One month after being sentenced for the murder, on December 17, 1956, in the District Court of Oklahoma within and for Tulsa County, two additional charges were filed: one, Case No. 16910, charged petitioner with Robbery with Firearms on June 16, 1956 (R. 3), the victim being one Claudie Kirk, and the second, Case No. 16911, charged petitioner with Kidnapping on June 17, 1956, the victim being the same Tommy Robert Cooke (R. 3). The Trial Court at petitioner's arraignment on December 19, 1956, assigned Fred Woodson, Public Defender, to represent petitioner on both charges and petitioner entered pleas of not guilty to both of said charges on said date (R. 4).

On January 30, 1957, petitioner withdrew the former pleas of not guilty and entered a plea of guilty to both charges and upon a finding of guilty the Trial Court heard statements and arguments on behalf of the State and the petitioner (R. 5 and 6-26). The record of the court proceedings after petitioner entered his plea of guilty in Muskogee County to the murder of Tommy Cooke was also introduced into evidence in the Trial Court in Tulsa County in the hearing on January 30, 1957, to determine the sentence to be imposed upon petitioner for the kidnapping of Tommy Cooke (R. 21-25).

On February 1, 1957, the Court entered judgment and sentenced petitioner to fifty years in the penitentiary in Case No. 16910, Robbery with Firearms, and sentenced petitioner to death in the electric chair in Case No. 16911, Kidnapping (R. 5 and 27-32). Thereupon, petitioner, through his counsel, gave notice in open court of his intention to appeal, in the Kidnapping Case only, to the Criminal Court of Appeals of the State of Oklahoma (R. 31). Thereafter, on February 19, 1957, petitioner filed a motion for new trial and asking the trial court to vacate its judgment and sentence in the kidnapping case, and to permit withdrawal of his plea of guilty (R. 33), and the Trial Court upon hearing said motion on March 1, 1957 (R. 34-37), overruled it and an exception was taken to said ruling and notice of appeal given on the judgment and sentence and the ruling on the motion (R. 38).

Thereafter, briefs were filed with the Criminal Court of Appeals of the State of Oklahoma; oral arguments were heard by that Court and on December 1, 1957, the Criminal Court of Appeals, being the court of last resort in Oklahoma in criminal cases, consisting of only three Judges, by a two-to-one decision with a majority and a minority opinion affirmed the Trial Court's sentence of death in the electric chair for the crime of kidnapping (R. 40-50).

A Petition for Rehearing (R. 55-66) was filed in the Criminal Court of Appeals by petitioner on December 18, 1957, and oral arguments heard on that petition on January 16, 1958. An order overruling the petition for rehearing was filed February 5, 1958, two Justices concurring, one dissenting (R. 67-68), and a special concurring opinion was written (R. 68-79).

A second petition for rehearing was filed and thereafter denied on February 26, 1958, by a two-to-one order (R. 79-80), and time was granted to file appeal in this Court.

Notice of appeal was filed by petitioner in the Criminal Court of Appeals on March 19, 1958 (R. 80-82). A petition for a Writ of Certiorari was filed by petitioner to this Court and this Court granted Writ of Certiorari on June 23, 1958, No. 790, Miscellaneous, now No. 124, October, 1958.

The Criminal Court of Appeals has entered orders staying the execution of petitioner, the last of which was filed February 26, 1958, pending further orders and the determination of proceedings in this Court (R. 79-80).

Summary of Argument

Due Process under the Fourteenth Amendment requires that every stage of criminal proceedings be guarded by fair dealing, fundamental fairness, and the principles of justice regardless of who the defendant is or the crime committed.

To subject petitioner to a conviction for murder and subsequently subject petitioner to a prosecution for kidnapping of the same victim, and as a part of the same continuing criminal transaction, where such kidnapping prosecution is to insure for the State that petitioner give up his life, such multiple prosecutions for retribution are a violation of Due Process.

Petitioner has been placed in double jeopardy for his life and subjected to double punishment for the same offense. Once petitioner has been convicted of murder, he cannot be prosecuted for the kidnapping of the same victim as a part of the same continuing criminal offense. The doctrine of double jeopardy prevents petitioner from being twice convicted for the same criminal offense.

Further, petitioner has been twice punished for the murder since the death penalty was assessed in the present

shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?' Hebert v. Louisiana, 272 U.S. 312, 71 L.ed. 270, 47 S.Ct. 103, 48 A.L.R. 1102, supra. The answer surely must be 'no.' What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider."

This Court in *Rochin* v. *California*, 342 U.S. 165, 168-169; 96 L.ed. 183, 188, states:

"* * * Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitation of Art. 1 §10(1), in the original Constitution, prohibiting bills of attainder and ex post facto laws, and of the Thirteenth and Fourteenth Amendments.

"These limitations, in the main, concern not restrictions upon the powers of the States to define crime, except in the restricted area where federal authority has preempted the field, but restrictions upon the *manner* in which the States may enforce their penal codes. * * *

"However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the *whole course* of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski v. New York, supra (324 U.S. at 416, 417, 89 L.ed. 1039, 65 S.Ct. 781). These standards of

justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the tradition and conscience of our people as to be ranked as fundamental,' Snyder v. Massachusetts, 291 U.S. 97, 105, 78 L.ed. 674, 677, 54 S.Ct. 330, 90 A.L.R. 575, or are 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 U.S. 319, 325, 82 L.ed. 288, 292, 58 S.Ct. 149."

This Court in *Brock* v. *North Carolina*, 344 U.S. 424, 427, 429; 97 L.ed. 456, 459 states:

"• • • As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the *facts and circumstances* of each case.

"• • • The conflicting views expressed in Ex parte Lange (see cases cited in opinion) indicate the subtle technical controversies to which the provision of the Fifth Amendment against double jeopardy has given rise. Implications have been found in that provision very different from the mood of *fair dealing and justice* which the Fourteenth Amendment exacts from a State in the prosecution of offenders. A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot *do better a second time.*"

and at 344 U.S. 435, Mr. Chief Justice Vinson, dissenting, states:

"While the technical ramifications evolved in the many jurisdictions as part of the doctrine of double jeopardy do not fall within the scope of due process, the basic idea is part of our American concept of fundamental fairness."

In *Hoag* v. *New Jersey*, 356 U.S. ——, 2 L.ed. 2d 913, 917, this Court said:

"But even if it was constitutionally permissible for New Jersey to *punish* petitioner for each of the four robberies as separate offenses, it does not necessarily follow that the State was free to *prosecute* him for each robbery at a different trial. The question is whether this case involved an attempt 'to wear the accused out by a multitude of cases with accumulated trials.' Palko v. Connecticut, supra (302 U.S. at 328).

"We do not think that the Fourteenth Amendment *always* forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence. The question in any given case is whether such a course has led to fundamental unfairness."

"In the last analysis, a determination whether an impermissible use of multiple trials has taken place cannot be based on any overall formula. Here, as elsewhere, 'The pattern of due process is picked out in the facts and circumstances of each case.' Brock v. North Carolina, 344 U.S. 424, 427, 428, 97 L.ed. 456, 460, 73 S.Ct. 349."

As we stated before, these cases cited from this Court are presented without special regard to their absolute applicability on points of fact, but these cases set forth the principles of Due Process under the Fourteenth Amendment.

Furthermore, these cases arose through criminal proceedings by the state courts and therefore have as their source of jurisdiction in this Court the Due Process Clause. It is clear that Due Process of Law under the Fourteenth Amendment has no set pattern but depends upon the facts and circumstances of each case, and is based upon fundamental fairness and justice.

It is interesting to note, the Oklahoma Criminal Court of Appeals has an excellent history of understanding and sound interpretation of Due Process of Law. Shortly after statehood, Presiding Justice Furman wrote an opinion for the Criminal Court of Appeals in which it clearly establishes a pattern of thought on Due Process, both under the Oklahoma and the Federal Constitution. That Court in *Anderson* v. *State*, 8 Okla. Cr. 90, 126 P. 840, 846 then said:

> "An entirely satisfactory definition of 'due process of law,' which would be applicable to and include all cases alike, cannot be easily stated. In criminal cases in a state court, 'due process of law' means a trial in a court of competent jurisdiction before an impartial judge and jury or before a judge alone, upon an accusation, either by indictment or information, as the state may provide, charging the accused with the violation of some state law, of which accusation the accused must have notice in time to enable him to prepare for trial. This trial must proceed according to the established procedure or rules of practice in such state applicable to all such cases. In other words, a defendant must have his day in court. The admission of evidence for or against the accused must be according to the established rules in such state in all such cases, and the punishment inflicted must be authorized by law."

And, in *Ex parte Hollins*, 54 Okla. Cr. 70, 14 P. 2d 243, 246, the defendant pled guilty to the charge of rape by force

and the Trial Court sentenced him to death. After reviewing the obviously inadequate procedure of the Trial Court, the Criminal Court of Appeals stated:

> "No more solemn duty can be imposed upon the court than the duty of protecting and the duty of taking human life. When life is to be taken under the judgment of a court, the act cannot be justified, except by the *strict observance* of the forms of the *law of the land.* No act which a court can be called upon to perform is more grave and solemn than to pronounce judgment and sentence upon a plea of guilty in a capital case."

Thus, Due Process has its origins in the history of man's struggle against the state and oppressive powers in whatever form. Due Process is no respecter of persons, applying its protection, when proper, not only to the rights of the innocent but as well to those who are guilty of heinous crimes. In the present case it is as though the State was *not satisfied* that petitioner should receive a life sentence for the crime of murder, and therefore the State in all its power tried the petitioner again for a crime against the same victim as was murdered previously. The second charge brought against petitioner was kidnapping, which crime was a part of the same continuing criminal transaction as the murder, and on the second try, the State succeeded in its efforts to make certain that the petitioner pay to society with his life. It is a type of *complete retribution* in which the results achieved by the State are, under the facts and circumstances of this case, so fundamentally unsound, unfair, and arbitrary as to be a denial of Due Process. The fact that petitioner, by the same State, would first receive a life sentence for the murder and then death for the kidnapping of the same victim in the same transaction is so illogical and unfair as to be recognized by jurists, lawyers, and laymen

alike as a fundamental mistake and a dangerous and unconscionable precedent.

The unsworn, hearsay facts, as presented by the County Attorney of Tulsa County to the Trial Court at the presentence hearing for the kidnapping, present a heinous murder (R. 11-12). But, does the dastardliness of the act deprive a defendant of the right to Due Process? Does the popular feeling that because a dastardly act has been committed, a defendant "must" die, justify a life be given for a life regardless of how it is done?

Unthinking people have always cried out for revenge even if it was obtained at the sacrifice of much of mankind's preciously gained humanity, fairness and justice. Those rights which we have won at great sacrifice must be protected and safeguarded, regardless of the crime of the defendant or his guilt or innocence. To do otherwise, and thereby lose sight of fundamentals, is to remove much of what has been achieved toward civilization, humaneness, and justice.

It is not enough that, in the name of justice, we excuse our conduct in sentencing a man by saying in effect he showed no mercy to his victim. Presiding Justice Brett, writing the majority opinion for the Criminal Court of Appeals states (R. 50):

> "We are concerned, herein, only with matters of law. Mercy, which this defendant did not extend to his victim, is within the power of the Pardon and Parole Board and the Governor. Art. 6, Sec. 10, Okla. Const."

Petitioner asks only for Due Process. As judges and lawyers we either mean to courageously adhere to those concepts we are sworn to uphold, or we should abandon our high position as the defenders of right, liberty and justice.

There can be no consolation in logic or reason for our courts to try to justify a sentence and overlook the basic facts behind the obtaining of a death sentence where Due Process has been denied the defendant. The meaning of justice and Due Process cannot be a purely individual concept.

Petitioner's contention is not a thesis against capital punishment. It is our firm contention that, if it could conceivably be said that the Trial Court in Muskogee County in sentencing the petitioner to life for murder made a mistake in judgment, then for the prosecutor of the State to seize upon the State's failure to get a death sentence for murder and try the petitioner again, to do all within its power to obtain a death sentence for a lesser act of the same criminal transaction, and as a result petitioner is made to give up his life to the State, then petitioner has certainly been denied the fundamental fairness which forms the basis of Due Process of Law. By "mistake," we do not mean legal error. We mean "mistake" from the standpoint that other state prosecutors and judges may differ in their opinion about what punishment the petitioner should have received in the first instance, and they try to cause petitioner to "run the gantlet" again. *Green* v. *U.S.*, 355 U.S. ——, 2 L.ed. 199, 206. If petitioner must be twice subject to the possibility of forfeiting his life, twice run the gantlet for the death of one victim, then Due Process of Law is violated. As this Court has in effect said in the cases cited above, prosecutors (and we presume, judges) cannot obtain repeated prosecutions and sentences to wear out the accused and increase, as in the present case, the "odds" of the State in eventually obtaining the death penalty. It must be considered in this case, that petitioner was *also convicted* in Tulsa County for armed robbery (a capital offense) and *sentenced to 50 years imprisonment as a part of these same prosecutions* (R. 27).

(1) Due Process Has Been Denied in That Petitioner Has Been Subjected to Double Jeopardy and Double Punishment.

Whether there has been, in any state court case, a placing of the defendant in double jeopardy or subjecting him to double punishment, is generally based on various exacting technical tests applied by the various state courts. In the course of our research on this question we find no entirely adequate test to be used to determine whether double jeopardy exists in state cases. It is clear, however, that regardless of the technical tests, the spirit of the double jeopardy (which includes double punishment) provision comes within the Fourteenth Amendment, certainly insofar as it affects fundamental fairness in a case. In fact, a criminal proceeding may not technically be double jeopardy, and still, under the facts, be a violation of Due Process. One of the basic cases decided by this Court on the points just mentioned is *Ex parte Lange*, 85 U.S. 163, 168, 170-171, 173, 178; 21 L.ed. 872, 876-879, wherein this Court in its opinion by Mr. Justice Miller states:

> "If there is anything settled in the jurisprudence of England and America, it is that *no man can be twice lawfully punished for the same offense.* And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. • • •
>
> "If in civil cases (says Drake, J., in State v. Cooper, 1 Green (N.J.) 375), the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that

the Crown shall not oppress the subject, or the government the citizen, by *unreasonable* prosecutions.

"These salutary principles of the common law have, to some extent, been embodied in the Constitutions of the several states and of the United States. * * *.

"In the case of Cooper v. State, in the supreme court of New Jersey (1 Green N.J. 361), the prisoner had been indicted, tried, and convicted for arson. While still in custody under this proceeding he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction at bar, and the supreme court held it a good plea. It is to be observed that the punishment for arson could not technically extend either to life or limb; but the supreme court founded its argument on the provision of the Constitution of New Jersey, which embodies the precise language of the Federal Constitution. After referring to the common law maxim the court says: 'The Constitution of New Jersey declares this important principle in this form: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our Constitution have thought it worthy of especial notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty.'

" * * * We shall see ample reason for holding that the principle intended to be asserted by the constitutional provision *must be applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence.*

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger of jeopardy of being a second time found guilty. It is the *punishment* that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can again be sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had and, on a second conviction, a second punishment inflicted?

"The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it. * * *

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases *no narrow or illiberal construction* should be given to the *words of the fundamental law* in which they are embodied."

In the case of *In re Nielson*, 131 U.S. 176, 33 L.ed. 118, the defendant had two indictments filed against him, one charging unlawful cohabitation between certain dates and the other charging adultery on the day following the conclusion

date charged in the cohabitation. Defendant was sentenced on the first indictment and pled former conviction to the adultery indictment. This Court, in an opinion by Mr. Justice Bradley, said and held:

"* * * The case was the same as if the first indictment had in terms laid the unlawful cohabitation for the whole period preceding the finding of the indictment. The conviction on that indictment was in law a conviction of a crime which was continuous, extending over the whole period, including the time when the adultery was alleged to have been committed. The petitioner's sentence, and the punishment he underwent, on the first indictment, was for that *entire, continuous* crime. It included the adultery charged. To convict and punish him for that also was a *second* conviction and punishment for the *same offense.* Whether an acquittal would have had the same effect to bar the second indictment is a different question, on which we express no opinion. We are satisfied that a *conviction* was a good *bar,* and that the court was wrong in overruling it. We think so because the material part of the adultery charged was comprised within the unlawful cohabitation of which the petitioner was already convicted and for which he had suffered punishment.

"* * * But be that as it may, it seems to us very clear that where, as in this case, a person has been tried and *convicted* for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

"* * * But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, there it is plain that while an acquittal would not or might not be a bar, a *conviction of the greater crime*

would involve the lesser also, and would be a *bar;* and then the proposition first above quoted from the opinion in More v. Commonwealth would apply. Thus, in the case of State v. Cooper, 13 N.J. Law, 361, where the defendant was first indicted and convicted of arson, and was afterwards indicted for the murder of a man burnt and killed in the fire produced by the arson, the Supreme Court of New Jersey held that the conviction of the arson was a bar to the indictment for murder, which was the result of the arson. So, in State v. Nutt, 28 Vt. 598, where a person was convicted of being a common seller of liquor, it was held that he could not afterwards be prosecuted for a single act of selling within the same period. * * * 'It must, in a certain sense, be considered as a *merger of all the distinct acts* of sale up to the filing of the complaint, and the respondent can be punished but for one offense.' "

The Supreme Court of Kansas in a well reasoned opinion by Justice Valentine in *State* v. *Colgate* (1884), 31 Kan. 511, 3 P. 346, 348-352, had these facts, defendant had been acquitted of setting fire to a building and that acquittal was held to be a good defense to subsequent prosecution for setting fire to books of account. The Court states:

"* * * And, upon general principles, a single offense cannot be split into separate parts, and the supposed offender be prosecuted for each of such separate parts, although each part might of itself constitute a *separate* offense. If the offender be prosecuted for one part, that ends the prosecution for that offense: provided such part, of itself, constitutes an offense for which a conviction could be had. And, generally, we would think that the commission of a single wrongful act can furnish the subject-matter or the foundation of only one criminal prosecution. * * *

"In almost every public offense, if not in every one, several separate and distinct facts may enter in to constitute the offense. These facts may exist contemporaneously with the wrongful act or acts of the offender, or they may take place subsequently and often, in succession, as succeeding consequences of the wrongful act or acts. * * *

" * * * Of course, the prosecutor may associate the criminal act with all its consequences, and then *carve* therefrom the *highest crime* that can be carved from such act and its consequences, and then prosecute the wrong-doer for such crime. If he chooses, however, he may carve out a smaller degree of crime, and prosecute for that only. But he should be allowed to *carve but once.* * * * The offense of setting fire to and burning the books, as well as the offense of setting fire to and burning the mill, would have been included in the aggregated offense of setting fire to and burning the mill, with all its contents. But we do not think that the prosecutor should be allowed to multiply prosecutions indefinitely, by dividing up the consequences of a single wrongful act, and founding a separate prosecution upon each of such consequences."

In the present case the question of double jeopardy and double punishment resolves itself into two aspects: (a) the conviction for the murder, in the course of the kidnapping, is a complete bar to a subsequent prosecution for kidnapping and, (b) to the extent that the death penalty for the kidnapping is based upon the fact that the kidnapping ended in the murder, for which petitioner had already been sentenced, then the death penalty is double punishment for the murder.

(a) It is presumed that in *Cooper* v. *State* (New Jersey), cited in the cases above, if the State had convicted for the

murder and then sought to convict for the arson that the same reasoning would prevail and the prosecution for arson would be barred. In other words, it would make no difference in reason and logic whether the crime was murder as the result and in the course of an arson, or an arson in the course of which a murder resulted. Conviction on one of the two crimes would be a bar to prosecution for the other. So, we contend it also follows from the rationale of the cases cited above, that after petitioner was convicted of murder occurring in the course of the kidnapping of the victim, he could not later be prosecuted for kidnapping in the course of which murder was committed on the same victim. The motive and intent in both crimes presumably was the same, namely to escape capture, and certainly the victim was the same. Further, in many cases of murder there are involved also the completed elements of kidnapping as well as perhaps other crimes. Multiple prosecution for each would result in the prosecutors, relying on the resources of the State, being able to eventually obtain their personally desired sentence for a defendant, all in violation of Due Process. In the present case, the kidnapping is such an integral part of the murder prosecution that any punishment for murder necessarily punishes for the kidnapping and does not leave the State free to again put petitioner in jeopardy or punish him for the kidnapping. Let the prosecutor *carve out the highest crime* that can be obtained from a criminal sequence, but he should be allowed to *carve but once.*

(b) It is a double punishment to petitioner, for the trial court in the kidnapping prosecution, to actually in fact inflict punishment again for the murder since petitioner had previously been sentenced for the murder. The Prosecuting Attorney of Tulsa County made certain that the murder was presented in his unsworn hearsay statement in the presentence hearing on the kidnapping (R. 11-12):

"* * * Williams forced Cook to drive to a point approximately 3 miles east and 4 miles north of Taft, in Muskogee County, to the end of a dead-end road, where Williams walked Cook out into the weeds where, according to Williams' own statement, Cook kept begging not to be tied up for that he, Cook, would have to stay there all night—no one would find him. Cook, according to Williams' statement had his hands up in front of his face and Williams shot Cook from the right side of the head, behind the ear. According to the autopsy report, the gunshot wound in the head produced death practically instantaneously and—

"Mr. Woodson: I would like again to interpose an objection here, that the defendant has pleaded guilty to two charges, one the armed robbery and one the kidnapping. The statements being made by the County Attorney relate to another charge, that has been passed upon in another jurisdiction.

"The Court: Well, I will consider it as the statement of the County Attorney of course and as a continuing thing in the matter, which I think is proper to advise the Court of all the facts surrounding the two crimes. Of course, as far as the highjacking case is concerned, it might not at all be competent, but from the kidnapping standpoint, it is, of course, a continuous thing, as long as he had the victim in his charge and under his control, I think all the facts pertinent to the incident are competent to the Court and the Court should know, so I will overrule your objection.

"Mr. Woodson: Exception.

"Mr. Edmondson: —and in the opinion of the pathologist who performed the autopsy, the gun was fired from very close range, certainly less than six inches and according to the angle of fire, and the angle of the bullet into the head, the opinion of the pathologist was

that the shot was fired from the rear of the deceased and to the right of the deceased."

In arriving at the extent of punishment to be inflicted for the kidnapping, the trial court had in mind primarily the *murder* when he sentenced petitioner to death for the *kidnapping* because the trial court in his comments in pronouncement of sentence upon the petitioner stated (R. 29):

> "The Court: The Court has been very deliberate in the matter of this case, has given it hours of consideration, and investigation; investigation of your record, investigation of the facts which have been alleged (fol. 62), which have been stated, and which you admit were part of this crime which you have committed in Tulsa County, which resulted in the murder of the victim, Reverend Cook, to which you have pled guilty and been sentenced in Muskogee County, and which the Court takes into consideration, that murder as being a part and parcel of the crime which is here, as a continuous thing. It is the Court's opinion, that there has never been in the history of Tulsa County, a more *brutal, vicious crime* committed, this crime to which you have pled guilty here. The fact that you have pled guilty to the crime of murder in Muskogee County and received a life sentence there, is *not* a particularly or material consequence in the matter of the Court passing sentence in this case."

From this statement of the Trial Court it is apparent that the murder was the motivating factor behind the death penalty for the kidnapping. The kidnapping in Tulsa County was not what the Trial Court had in mind when he stated that, "there never has been in the history of Tulsa County, a more brutal, vicious crime committed, this crime to which you have pled guilty here." The murder, and only

the murder, moved the Court to the fundamental injustice of repunishing petitioner for that crime, and more *severely* than he had already been punished for it before, when the crime actually charged in Tulsa County was kidnapping. The Information charging the kidnapping to which petitioner pled guilty, does not show the use of firearms, threats, violence or harm (R. 3-4). The so-called facts of the kidnapping do not indicate the kidnapping was in itself heinous or brutal crime.

The Presiding Justice of Criminal Court of Appeals of Oklahoma in his opinion with regard to the murder states (R. 47):

> "The reason for killing the victim is obvious. It is to destroy the means of the kidnapper's positive identification. Hence, it was reasonable for the trial judge in measuring the defendant's intent at the time of the kidnapping in the case at bar, to consider that the defendant, Williams, not only intended to deprive Tommy Cooke of his liberty and property, but to take his life as the means of destroying the defendant's identification. Moreover, it was for the trial court to consider that thereafter it was the defendant's intent to steal Cooke's automobile as a means of avoiding apprehension for the violations he had already committed, and also to use it as an instrument of escape for those crimes he intended to commit in his one man crime wave. Yet, it is urged there is nothing particularly vicious in the single act of kidnapping.
>
> "We might agree that contention possesses merit when the kidnapping is viewed as an isolated crime. But, the courts are not required to insulate themselves to facts clearly manifesting intent, and the ultimate consequences of criminal acts. Neither cold law, righteous justice, nor plain logic requires such an approach to

> the problem of imposing punishment in any case. To the contrary, justice requires a consideration of all the factors leading up to, at the time of the commission of the act, and even acts occurring subsequent thereto, in determining intent in many cases. When so measured, the instant act of kidnapping presents a most heinous picture. Tommy Cooke was marked for death immediately upon Williams's asserting dominion over him. The defendant's dastardly intent was confirmed when he lost little time in compelling his victim to drive to an isolated, dead-end road where, in a cold and calculating manner, he immediately executed him. These are all matters within the trial court's discretion and consideration in determining the penalty to be imposed."

With all due respect, it is apparent that even the Criminal Court of Appeals in analyzing the trial court's death sentence, was again repunishing petitioner for the murder. There was much emphasis placed by the writer of that opinion on the consideration of the intent of petitioner. Both the trial court and the appellate court have assumed that the intent of petitioner was to kill the victim from the very beginning of the kidnapping and thus create a kidnapping with intent to murder. And, this in turn is to make the kidnapping more dastardly. However, this is a wholly unwarranted presumption of intent to help the courts justify the death penalty. Nothing in the record is pointed to by the trial court or the appellate court upon which such intent can be based; to the contrary, petitioner, according to the County Attorney's hearsay statement, started to tie up the victim (R. 11-12). However, even assuming that petitioner had intended to kill the victim from the beginning of the kidnapping, the intent to murder would "merge into the completed crime" of murder, *Prince* v. *United*

States, 352 U.S. 322, 328, 1 L.ed. 2d 370, 374. Regardless of the basis of rationalization, it is obvious that petitioner has been twice punished for the murder occurring in Muskogee County in violation of Due Process of Law. All of the comments appearing of record and in the opinions of the trial and appellate courts indicate that there occurred only one continuous criminal transaction, so closely related in all respects, that one crime cannot be considered or punished without punishing for the other, especially where petitioner was convicted and sentenced for the murder first.

It is apparent from the quotations above cited from the record, that the State of Oklahoma was in this case in fact *determined* that through the use of repeated prosecutions petitioner would eventually suffer the death penalty. In *Ciucci* v. *Illinois*, 356 U.S. ——, 2 L.ed. 2d 983, this Court, upon a different fact situation, had the same question before it. In view of the different fact situation, we cite that case in support of our contention. Both the majority and minority in the *Ciucci* case sustain our position in this case. The *Ciucci* case involved three separate prosecutions by the State for the murder of four victims killed on one single occasion by the defendant. Counsel for defendant had included in their brief to this Court clippings from the newspapers which contained statements by the prosecution that the sentences (20 years and 45 years) in the first two murder cases were unsatisfactory, and that the prosecution was *determined* to prosecute Ciucci until the death penalty was obtained. This Court did not consider the newspaper articles since they were not included in the record and were not considered by the State courts. However, two of the Justices who concurred in the majority opinion indicated that if the defendant had been able to establish the prosecution's determined purpose as alleged, they might have held that fundamental unfairness did exist. Also, in *Ciucci* v.

Illinois there were *separate victims* of each murder and each crime prosecuted was of *equal magnitude*. In the present case there was the *same victim* in each prosecution, and kidnapping, as a separate crime, is a crime of a *lesser magnitude* than murder. (These same distinctions as well as others existed in *Hoag* v. *New Jersey*, *supra*.) These are vital distinctions, and except for these distinctions, the present case fits squarely within that portion of the *Ciucci* case which denounces repeated prosecutions by the State to achieve the death penalty. In the present case we do not have to rely on newspaper clippings to establish the *determined* purpose of the State of Oklahoma to prosecute the petitioner until the death penalty was obtained. The purpose of the kidnapping prosecution in Tulsa County was to make *certain* that petitioner receive the death penalty for murder, and this is obvious from a reading of the County Attorney's statement in the record (R. 10-18) and as quoted above and examining in turn how the trial and appellate courts were misled into committing an injustice as above quoted. The present case is consistent with the majority opinion and also clearly in line with the dissenting opinion in the *Ciucci* case which states:

> "This case presents an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieves its desired result of a capital verdict."

The kidnapping prosecution in Tulsa County was a successful attempt on the part of the State to make sure that petitioner received the death penalty for the murder in Muskogee County. The use of the facts of the murder as a basis for augmenting the fair and just punishment for the kidnapping is a further attempt through multiple prosecutions for the same offense to achieve a desired sentence by the State, all of which is in violation of Due Process of Law.

(2) Due Process Has Been Denied in That the Doctrine of Res Judicata Precludes a Second Punishment Being Inflicted Upon Petitioner for the Murder.

The doctrine of *res judicata* would prevent the trial court, in fixing the penalty for the kidnapping, from again considering and punishing petitioner for the previous murder for which petitioner had been sentenced and which was a part of the same continuing criminal transaction. This Court in *Sealfon* v. *United States*, 332 U.S. 575, 578; 92 L.ed. 180, 184 held:

> "• • • But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (United States v. Oppenheimer, 242 U.S. 85, 61 L.ed. 161, 164, 37 S.Ct. 68, 3 ALR 516; United States v. De Angelo (CCA 3d NJ), 138 F.2d 466, 468; annotation in 147 ALR 991; see Frank v. Mangum, 237 U.S. 309, 334, 59 L.ed. 969, 983, 35 S.Ct. 582) and operates to conclude those matters in issue which the verdict determined though the offenses be different. See United States v. Adams, 281 U.S. 202, 205, 74 L.ed. 807, 808, 50 S.Ct. 269."

In the above case it was necessary to determine what issues the verdict of the jury determined. In the present case, there can be no question that the plea of guilty to the murder in Muskogee County and the judgment and sentence entered therein, concludes the murder and all of its circumstances and prohibited the trial court in Tulsa County from again considering and punishing for the murder for the purpose of sentencing the petitioner in the kidnapping case. In fact, since the trial court in Muskogee County considered the kidnapping in his sentence for the murder, the doctrine of *res judicata* should prevent the issue and facts of the kidnapping from being prosecuted again. Certainly,

under this doctrine, the trial court for the purpose of determining the sentence for kidnapping cannot reconsider and punish petitioner again for the murder.

(3) Due Process Has Been Denied to Petitioner in That the Trial Court Considered Improper Statements in Aggravation of the Kidnapping.

With reference to 22 O.S. 1951, secs. 973-975, set forth in full under "Statutes" above, it is petitioner's contention that sec. 973 leaves a "discretion" with the trial court *to hear* the circumstances of the case when either counsel "suggests," or the trial court "may in its discretion" *not hear* any circumstances of the crime at all. But, *if* the court exercises its discretion to hear circumstances in aggravation or mitigation, then definitely, under sec. 974, the court *must* hear the testimony of witnesses examined in open court and upon notice to the adverse party. Furthermore, our legislature removes any doubt about the evidence to be heard, by adding sec. 975, which clearly provides that nothing "verbal or written, can be *offered* to or *received* by the court * * * in aggravation or mitigation of the punishment, except as provided in the last two sections." In other words, where punishment is left to the trial court, it has discretion to hear or not hear further circumstances, but if it elects to hear, it must hear "witnesses." That is to say, hear evidence under oath, subject to cross examination, and under the rules of evidence.

While the Criminal Court of Appeals of Oklahoma has never directly passed on the meaning of the sections in question, the language used by that Court in previous cases is enlightening and should be considered. In the case of *In re Watkins*, 21 Okla. Cr. 95, 205 P. 191, the Court held:

> "The procedure followed by the trial judge in hearing testimony of witnesses as to the enormity of the crime

before assessing the death penalty was proper and to be commended. Section 5954 Revised Laws 1910." (now section 973)

Again in *Nowlin* v. *State*, 128 P. 2d 1023, the Court held:

"Evidence was submitted at the hearing upon the motion touching this issue. This was proper under the Statutes above quoted."

Again in *Emmons* v. *State*, 291 P. 2d 838, 842, the Court held:

"The proof of prior conviction was by Court records and officials. This procedure has been many times approved and is not dependent upon whether the accused at the trial testified or did not testify."

In the present case, the Criminal Court of Appeals states (321 P. 2d 993-994; R. 43-44):

"• • • But, two things are clear under the provisions of sec. 973. First, pursuing this method of procedure is a matter of the trial court's sound discretion. Second, its use is *further* contingent upon the request of either the state or the defendant. • • •

"It is contended that under the provisions of sec. 975 it is the mandatory duty of the court to hear witnesses. But, in construing secs. 974 and 975 in light of the provisions of sec. 973, we are of the opinion that both the provisions of sec. 974 and sec. 975 are contingent upon the request for evidence under the provisions of sec. 973, or it is within the trial court's discretion to pursue some other reasonable method. When the parties fail to make a request for the privilege thereof, the same is waived and some other method of supplying the court with the necessary information for the

pronouncement of judgment and sentence may be substituted instead."

Thus the highest court of Oklahoma construes the section 973 to mean that the trial court has, first, the discretion to hear circumstances and, second, that if it should desire to hear circumstances, then the trial court has the further discretion to use either the method set forth in the statutory sections or some "other reasonable method." We respectfully submit that such a misconstruction of the sections is a refutation of the clear words of the statute and intent of the legislature. These statutes had their origin in our State from the Compiled Laws of Dakota 1887. Our State had the advantage of compiling laws based upon the best laws of other states which preceded us into the Union, and our legislature clearly meant these sections to be a safeguard to protect a defendant from abuses by the State in sentencing. It goes without saying, these sections also protect the State in the same manner. The construction placed upon these sections by the Oklahoma Criminal Court of Appeals would leave them with no force and effect and permit the trial judge to hear whatever information he pleased even though request had been made to invoke the Statutes.

We recognize that this Court generally considers itself bound by the construction of state statutes by the highest court of a state. However, under the doctrine announced in *Yick Wo* v. *Hopkins*, 118 U.S. 356; 30 L.ed. 220 (and many cases since), the highest court of the state may bind this Court in construction of the state statutes, yet if the state's construction, administration or application of its statute is wholly unreasonable or fundamentally unfair it may violate the Due Process Clause under the Fourteenth Amendment, as in the present case.

Further, the Oklahoma Criminal Court of Appeals said that the parties failed to make request under sec. 973 for the privilege of invoking the statutory procedure (321 P. 2d 994; R. 44), and that defendant did not attempt to invoke the provisions nor did defendant request the taking of evidence in mitigation, and at no time intended to invoke said provisions. Section 973 states "upon suggestion of either party," then the court may hear or not hear circumstances at his discretion. It is not incumbent upon the defendant to invoke the provisions of the statute, the State can do so, as here the County Attorney states to the trial court that it should be, "advised of the facts in this case" and "we have typed up a brief statement of facts concerning both of these crimes," etc. (R. 10). Such language by the County Attorney would certainly amount to a "suggestion" or "request" that he has circumstances in aggravation that he wants to introduce. Therefore, in the present case, the State invoked the statutes and if the trial court wanted to hear circumstances in aggravation or mitigation, he was bound to do so by hearing sworn witnesses in open court.

The statement of the County Attorney of Tulsa County to the trial court in the presentence hearing on the kidnapping plea is hearsay in its entirety (R. 10-18). Many times during the course of this statement the County Attorney mentions that "by his own admission" or "according to Williams' own statement" such and such took place or was said. If such confession or admission by petitioner exists why were not the documents or witnesses presented to the trial court? The trial judge in Muskogee County in discussing the sentence for the murder mentions that a motion to suppress evidence was held in his court (R. 23) and that there were some two confessions, one the trial judge never saw, it was destroyed, and the other was, according to testimony, obtained after petitioner was beaten (R. 24). Certainly, if a confession or confessions existed

the County Attorney of Tulsa County owed the duty to the State, the trial court, and the petitioner to produce his documents or witnesses. The County Attorney does not say how or where he got his "statement of fact." If it was gained through personal conversation with petitioner, we are not aware of it, and certainly such a fact should have been mentioned in the prepared "statement" by the office of the County Attorney. It may have been prepared by a clerk or investigator of his office who was not an officer of the court. The County Attorney never stated the source of his alleged facts, or that he had verified or vouched for the facts and not only was the long statement hearsay, but it was liberally loaded with highly inflammable and prejudicial language. This entire procedure was in flagrant violation of the careful, humane method prescribed by our legislature and violated the concept of fundamental fairness that must be present in all stages of all judicial proceedings (especially criminal capital cases) to comply with the Fourteenth Amendment Due Process.

Counsel for petitioner in the trial court, Mr. Fred Woodson, objected three separate times (R. 11, 12, 13) to the hearsay statement in question. On the occasion of the last objection, the trial court allowed a continuing "objection to the entire statement being made" (R. 13). All objections made by Mr. Woodson were properly preserved. Much of the special concurring opinion written by Justice Powell of the Oklahoma Criminal Court of Appeals (321 P. 2d 1002-1008; R. 68-77) is based upon the fact that the trial court asked the petitioner certain questions concerning corrections and the accuracy of the long and inflammatory hearsay statement of the County Attorney. The petitioner answered these questions only briefly, not fully, trying to correct the impression left by the long statement of the County Attorney. The concurring opinion emphasizes a "waiver" and that the conduct of petitioner "was

equivalent to a stipulation" (321 P. 2d 1008; R. 78). However, any answer made by petitioner was with the realization that objections had been previously preserved, that the procedure used was not just, and with the understanding that errors in the trial court could be remedied on appeal. At no time did counsel or petitioner desire to waive or stipulate away either the *objections* entered or petitioner's *life*. The law on this question is as stated in 89 C.J.S. pp. 504 and 505:

> "Error in the admission of evidence is not waived by conduct not amounting to an express or implied assent to the reception of the evidence. • • • The erroneous admission of evidence is waived by a subsequent withdrawal of objections thereto; but the waiver must be so specific as to leave no doubt on the subject. • • •"

In *Palmer* v. *City of Long Beach*, 33 Cal. 2d 134, 199 P. 2d 952, 958, the Court states:

> "In view of an attorney's duty to his client, it should not lightly be assumed that he stipulated away his case. • • • Stipulations must be given a reasonable construction with a view to giving effect to the intent of the parties and the language used will not be so construed as to give it the effect of the admission of a fact obviously intended to be controverted or the waiver of a right not plainly intended to be relinquished. • • •'". (Citing many authorities.)

And the Court further states, quoting from another California opinion:

> "'• • • but there should be no sacrifice of substantial rights merely to subserve the constant importuning to speed up trials. The purpose of every trial is to examine into disputed facts. • • • Stipulations are ordi-

narily entered into for the purpose of avoiding delay, trouble, or expense. * * *'"

This case was a civil suit and the language is strong and clear. How much more important, then, is it in a criminal case, with a defendant's life in the balance, to protect his every right and to assume no fact or waive any right that prejudices him. In *Green* v. *United States*, 355 U.S. ——, 2 L.ed. 2d 199, 206-207, this Court states:

"'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. Cf. Johnson v. Zerbst, 304 U.S. 458, 82 L.ed. 1461, 58 S.Ct. 1019, 146 ALR 357. * * * And as Mr. Justice Holmes observed, with regard to this same matter in Kepner v. United States, 195 U.S. 100, at 135, 49 L.ed. 114, 127, 24 S.Ct. 797, 1 Ann. Cas. 655: 'Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.'"

Finally, even if we consider that the procedure used, by the County Attorney and the trial court in presenting presentencing information by an unsworn statement over objection of petitioner, is correct under Oklahoma procedure, is it not a procedure subject to fundamental unfairness? In other words, assuming the Oklahoma Criminal Court of Appeals is correct in its interpretation of the statutory provisions in question here, and the trial court has discretion in all events as to its sources of information, does this mean that the trial court can permit unjust practices and unfair abuses in our humane administration of the law

to determine the sentence to be assessed? In *Williams* v. *New York*, 337 U.S. 241, 93 L.ed. 1337, this Court had a case before it in which New York procedural policy encourages the trial court to consider information about the defendant. This Court states (337 U.S. 251, 93 L.ed. 1344):

> " • • • Leaving a sentencing judge free to avail himself of out-of-court information in making such a fateful choice of sentence does secure to him a broad discretionary power, one susceptible of abuse. • • • We cannot say that the due-process clause renders a sentence void *merely* because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."

Mr. Justice Rutledge dissenting states (337 U.S. 253 or 93 L.ed. 1345):

> " • • • The record before us indicates that the judge exercised his discretion to deprive a man of his life, in reliance on material made available to him in a probation report, consisting almost entirely of evidence that would have been inadmissible at the trial. Some, such as allegations of prior crimes, was irrelevant. Much was incompetent as hearsay. All was damaging, and none was subject to scrutiny by the defendant.
>
> "Due process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through all the stages of the proceedings against him."

It must be considered in the case above, that the trial court in New York was relying on New York Statutes, and upon a probation report. As this Court states, "probation workers making reports of their investigation have not been trained

to prosecute but to aid offenders." This is entirely different from the prejudicial, unnamed source, unverified and unvouched for report of the present case presented by the Tulsa County Attorney who is trained to prosecute, and particularly, as here, where he is overzealous and too sensitive to public clamor.

In the case of *Townsend* v. *Burke*, 334 U.S. 736; 92 L.ed. 1690, this Court reviewed the record as to the sentencing of that defendant upon a plea of guilty and held that the absence of defense counsel placed the defendant at a disadvantage and that the trial court either designedly or carelessly was misinformed or misread the record in the sentencing; that the result reached, "whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." Error on the part of the trial court in considering, and being influenced by, inflammatory, prejudicial information, or misinformation, or misinterpretation of information, as we have in the present case, is subject to the test of Due Process. The foregoing statement should also be applicable upon the record of any given case where such fundamental unfairness exists even though the defendant was represented by counsel. Representation by counsel, no matter how capable, cannot be the entire answer to so fundamental a problem, for such errors may well occur with counsel present, as in the present case.

(4) Due Process Has Been Denied in That the Punishment Assessed Against Petitioner Is Wholly Unreasonable and Disproportionate to the Kidnapping in This Case.

There are four crimes punishable under the Statutes of Oklahoma by death, they are: murder, robbery with a dangerous weapon, rape in the first degree, and kidnapping. We recognize that the death penalty has been assessed in this State in a few cases for murder upon a plea of guilty, and that such penalty was sustained by the Criminal Court

of Appeals. Even the most seasoned and experienced defense counsel, in considering such cases in the present case, would naturally reason that those cases were not precedents in this kidnapping case since petitioner had already been previously sentenced for the murder. Thus in trying to advise petitioner as to the punishment he might receive upon a plea of guilty to the kidnapping petitioner's counsel did not feel the death penalty could be founded upon those Oklahoma murder cases since kidnapping, as such, is a crime of lesser magnitude than murder and petitioner had been previously sentenced for the murder. Petitioner's counsel found that the death penalty had been assessed, and sustained by the Oklahoma Criminal Court of Appeals, in some few cases of rape in the first degree, and robbery with firearms. But, in none of those cases did we find that these were split or *second* prosecutions by the State of Oklahoma even though most of the cases involved the elements of other completed crimes.

There are six kidnapping cases reported in Oklahoma other than this present case. In each of these cases the purpose was—rape, robbery, or to escape incarceration. In all six cases the kidnapping was potentially dangerous to the victim; most of them recite facts showing threats and use of firearms and many cases involved hardened criminals with prior criminal records. Further, in five of these cases, the punishment was assessed by Oklahoma juries and should be indicative of the feeling of the people. Yet the maximum punishment assessed in these six kidnapping cases in Oklahoma was *50 years* in the State penitentiary. The overall punishment, for that crime in Oklahoma, average was *16.3 years* (exclusive of the present case which is the *first death penalty* case for kidnapping in Oklahoma). *Norris* v. *State*, 68 Okla. Cr. 172, 96 P. 2d 540; *Shimley et al.* v. *State*, 87 Okla. Cr. 179, 196 P. 2d 526; *Flowers* v. *State*, 95 Okla. Cr. 27, 238 P. 2d 841; *(Nathaniel) Williams* v. *State*, 96 Okla. Cr.

362, 255 P. 2d 532; *Phillips* v. *State*, Okla. Cr., 267 P. 2d 167; *Ratcliff* v. *State*, Okla. Cr., 289 P. 2d 152.

The *Norris* case cited above involves a defendant charged with kidnapping, second and subsequent offense. Since the defendant was charged under the habitual offender act of Oklahoma (21 O.S. 1951, sec. 51), the maximum punishment for the kidnapping would have been life in the penitentiary. The information filed charged defendant with having been previously convicted and sentenced for: robbery with firearms, murder in the first degree, and another murder in the first degree occurring on the same date as the first murder. The portion of the testimony repeated in written opinion has language such as, " * * * Norris said, 'Shoot him in two, if you have not guts enough to shoot him, give me that gun, I have.'" The victim was finally able, by force, to get away from defendant and his accomplice. The defendant Norris was sentenced in accordance with the verdict of the jury to imprisonment for a term of 30 years.

In reviewing the six Oklahoma kidnapping cases there was nothing that would indicate that petitioner would on a plea of guilty to the kidnapping receive the death penalty especially since he had previously been sentenced for murder. Jurists, lawyers, and defendants have the duty to resort to prior cases of the highest courts of our states, and they naturally rely and have the right to rely on those cases, where applicable, as precedents. We should be able to respect those cases and rely upon the sentences approved therein as being a guide in similar cases under the doctrine of *stare decisis*. We submit that lawyers, regardless of how experienced, would have reviewed the Oklahoma kidnapping cases without suspecting that a plea of guilty in the present case would bring a sentence of death in the electric chair. Nothing about these prior cases gives notice to that effect, and the present case amounts to a type of unlawful entrapment of the petitioner.

Furthermore, it must be considered that the trial judge in Muskogee County had previously sentenced the petitioner to life in the penitentiary for the murder. This fact cannot be lightly waved aside, or ignored. That judge states (R. 23), "I want to do the right thing. I may be *criticized* for what I'm about to do, * * *" Assuming that he made some mistake or mistakes in analysis of prior murder cases or in considering the "facts" as he knew them, the sentence he imposed was nonetheless a solemn conscientious judicial determination and, it was made without fear of possible popular criticism that would follow. He had heard testimony in a motion to suppress evidence and at least seen a confession whether valid or not, and considered the circumstances in aggravation and mitigation. His court and the judgments rendered therein are of an equal status with the trial court in Tulsa County in the present case. We carefully considered the record of the trial court in Muskogee County, and at the presentence hearing in Tulsa County that record was introduced into evidence (R. 21-25). It is submitted that the sentence for the murder should have been considered by the Tulsa trial court and given the weight and respect due any judicial determination.

The Oklahoma Legislature passed the present kidnapping statute (21 O.S. 1951, sec. 745) permitting the death penalty in 1935, sometime after the Lindbergh Act was passed by Congress. It is difficult to conceive that by the passage of the Oklahoma Statute the Legislature raised kidnapping, *per se*, to be a crime of same magnitude as murder. There is no more heinous crime than murder, and once the defendant has been sentenced for the murder, he would naturally consider that any sentence assessed for a crime of lesser magnitude would be less severe than that assessed in the murder where the lesser crime is a part of the same criminal transaction against the same victim. The Legislature certainly did not intend that the death penalty be inflicted

for the kidnapping where the defendant had already been sentenced for the ultimate crime committed against the victim. They intended that the death penalty be available where *only the one prosecution* is brought against a defendant for the kidnapping and where the facts of the kidnapping are highly aggravated and result in some other completed serious crime.

The punishment assessed in the present case is not excessive in the sense that it exceeds the punishment permitted by statute for the crime of kidnapping. However, the death penalty does exceed the *just* punishment for this present case. This Court has recognized that a state may deny Due Process by enacting statutes that prescribe a penalty, "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable (citing other cases)." *St. Louis, Iron Mountain and Southern Ry. Co.* v. *Sicksey Williams,* 251 U.S. 63, 67; 64 L.ed. 139, 141. Applying the language of that case to the present case, we do not contend that the death penalty provision of the statute is disproportioned and unreasonable in a *proper* case, as we state above, but under the facts and circumstances of *this case* the punishment assessed to petitioner fits perfectly within the doctrine announced by that language. In other words, while the punishment provided in the statute, *per se* may not be excessive, yet the administration of the punishment may be so unjust, "oppressive," "unreasonable," and "disproportionate" to the crime actually committed, as appears in the present case, that the punishment is in violation of the Due Process Clause.

Conclusion

We respectfully submit that the entire criminal prosecution in Tulsa County for kidnapping was an obvious, unreasonable, fundamentally unfair attempt by the State of Oklahoma to insure that petitioner pay with his life for the murder in Muskogee County. The means and measures used to bring about the death penalty was through consecutive prosecutions and through proceedings which were, as we have pointed out above in this case, not in the spirit of fair dealing, nor in keeping with the fundamental fairness and justice required by Due Process. We therefore respectfully urge, that in view of the matters set forth in this brief, that this Court hold that petitioner has been denied Due Process of Law under the Fourteenth Amendment in this kidnapping case.

Respectfully submitted,

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